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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR, OF THE FEDERAL AVIATION ADMINISTRATION, *et al.*,

Petitioners,

v.

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE,

Respondents.

BRIEF FOR RESPONDENTS

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REUBEN B. ROBERTSON, III
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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Is a statute which permits any record in the possession of an agency to be withheld from disclosure whenever the agency determines that disclosure is not required in the public interest, a statute which specifically exempts such records from disclosure within the meaning of 5 U.S.C. §552(b)(3)?

STATUTES INVOLVED

Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. §1504, provides:

Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the [Civil Aeronautics] Board or the [Federal Aviation] Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

The Freedom of Information Act, 5 U.S.C. §552, provides in pertinent part:

> §552. **Public information; agency rules, opinions, orders, records, and proceedings.**
>
> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (b) This section does not apply to matters that are —
>
> * * *

> (3) specifically exempted from disclosure by statute;
>
> * * *

STATEMENT OF THE CASE

The petitioners Federal Aviation Administration ("FAA") and its Administrator, Alexander P. Butterfield, have broad responsibilities for the regulation of the safety of civil aeronautics. Under section 601(a)(3) of the Federal Aviation Act, as amended (the "Aviation Act"), 49 U.S.C. §1421(a)(3), the Administrator "is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce" through the issuance of standards, rules and regulations governing, *inter alia*:

> (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made . . . .

In performing these functions, the Administrator is directed to "give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . . ." Section 601(b) of the Aviation Act, 49 U.S.C. §1421(b).

Section 605(b) of the Aviation Act, 49 U.S.C. §1425(b), directs the FAA to employ inspectors in order to insure that the equipment of the air carrier is properly maintained

and in safe condition. In carrying out his responsibilities, the Administrator has full power to investigate, obtain information, and require accurate reports from air carriers; failure of an air carrier to comply may result in decertification, or criminal or civil penalties. Sections 609, 901, & 902(e) of the Aviation Act, 49 U.S.C. §§1429, 1471, 1472(e).

In 1966 the FAA instituted a new procedure for surveillance of air carrier maintenance and safety operations, known as the Systemsworthiness Analysis Program or "SWAP."[1] Under this program special teams of highly trained and experienced FAA inspectors make periodic visitations to the certificated air carriers to inspect and analyze their maintenance and safety operations. The SWAP teams seek to identify significant failures and defects in the carriers' systems, procedures, record-keeping, organization, training, and supervision that may adversely affect compliance with applicable regulations and safety standards. The team's findings and recommendations for corrective actions are then fully disclosed to the airline management in a special meeting held for that purpose, and a final SWAP Report is prepared containing the findings and recommendations developed during the inspection.

During the summer of 1970 respondents and others were engaged in a study of airline safety, including an

[1] The SWAP Program, as applied to air carriers, is set forth in FAA Systemsworthiness Analysis Program Handbook 8000.3B, as reprinted in November 1970, which appears in the Single Appendix in this Court ("A.") at pages 44-111. The FAA has issued a revised version of the SWAP Handbook, FAA Order 8000.3C, dated April 14, 1972, which is reproduced at A. 122-205, with subsequent changes set forth at A. 206-256.

examination of the activities of the FAA. During the course of that study, they made a number of requests to FAA officials under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, some of which were granted, but most of which were refused .

In August 1970 in accordance with FAA procedures, respondents formally appealed the denial of access to various documents including the SWAP Reports which are at issue here. The following December, while that appeal was still pending before the FAA, certain of the major airlines privately wrote the Administrator through their trade association, the Air Transport Association of America (A. 112-14). In that letter the airlines made a request pursuant to section 1104 of the Aviation Act, 49 U.S.C. §1504, that SWAP Reports be withheld from public disclosure, suggesting that if public disclosure were made, airline management would no longer cooperate with the SWAP program. (A. 112). On February 18, 1971, the Administrator issued a determination under section 1104 that "all SWAP reports in existence or hereinafter to be made" shall be withheld from the public. (A. 115). On February 24, 1971, the FAA wrote to the respondent Simandle denying the appeal for access to SWAP Reports. (A. 29-33).

Respondents were also unsuccessful in obtaining access to the FAA's publications known as Mechanical Reliability Reports (MRRs). These documents contain summaries of reports of serious mechanical malfunctions which are required to be submitted to the FAA by the airlines. The reports concern such problems as in-flight fires, engine shutdowns during flight, landing gear malfunctions, and other aircraft system problems requiring emergency action.

(A. 27, ¶3). The summaries are compiled by the FAA, printed at public expense, and mailed out on a daily basis to a wide audience within the aviation industry. (A. 27, ¶5). Respondents were told by the FAA, however, that the MRRs would not be made available to them without the consent of the Air Transport Association. (A. 14, ¶51). The request for these reports, initially made in August 1970, was definitively rejected by the FAA on April 1, 1971. (A. 7, ¶13).

This action was thereafter commenced in the United States District Court for the District of Columbia, seeking access to both the SWAP Reports and the MRRs. In separate counts respondents also sought various other injunctive relief against, *inter alia*, the charging of excessive fees for inspecting or copying public documents, undue delay in responding to information requests, and other violations of law. (A. 7-17). After the suit was filed, the Administrator issued another *ex parte* order at the request of the Air Transport Association, purporting to withhold the MRRs from public disclosure under the authority of section 1104, just as he had earlier ordered with regard to the SWAP Reports. (A. 18, ¶27, and Affidavit of John H. Shaffer re MRRs and Attachments 3 and 4 thereto).

After issue had been joined, respondents moved for partial summary judgment on the portion of their complaint seeking access to the MRRs and the SWAP Reports. They submitted with their motion a sample SWAP report (A. 34-37), and a typical MRR daily summary (A. 27, ¶5). Thereafter, petitioners cross-moved for summary judgment on that part of the complaint on which respondents had moved, and later moved to dismiss the action in its entirety.

In response to respondents' motion, petitioners claimed that both the SWAP Reports and the MRRs could be withheld under the third and fourth exemptions to the FOIA, 5 U.S.C. §§552(b)(3) (specifically exempted by statute — §1104)[2] and 552(b)(4) (confidential commercial information).[3] (A. 38). In addition, for the SWAP reports respondents claimed that the fifth and seventh exemptions, 5 U.S.C. §§552(b)(5) and 552(b)(7), which applied to intra-agency memorandums[4] and investigatory files compiled for law enforcement purposes,[5] also justified secrecy.

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[2] 5 U.S.C. §552(b)(3) exempts records ". . . specifically exempted from disclosure by statute."

[3] 5 U.S.C. §552(b)(4) exempts ". . . trade secrets and commercial or financial information obtained from a person and privileged or confidential".

[4] 5 U.S.C. §552(b)(5) exempts ". . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[5] At that time, 5 U.S.C. §552(b)(7) exempted ". . . investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency". Since the filing of the petition in this case, that exemption has been amended so that it now exempts:

> Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation,

(continued)

On November 8, 1972, the District Court entered an Order granting respondents' motion for partial summary judgment and directing that they be granted immediate access to the SWAPs and the MRRs on the same terms and conditions as apply to persons connected with the airline industry. (Appendix to Petition for Certiorari, 19A-20A, hereinafter "App. ____"). That Order also granted the motion of petitioners to dismiss the remaining counts of the complaint. The portion of the Order requiring petitioners to immediately provide respondents with the MRRs and SWAPs was temporarily stayed pending a determination of whether an appeal would be taken. Thereafter, when petitioners decided not to appeal the decision as to MRRs, the stay was lifted for MRRs, but has been continued to date for the SWAPs.

In the Court of Appeals petitioners continued to press their claim that section 1104 was a statute which "specifically" exempts SWAP Reports from disclosure under exemption 3, as well as their contention that exemptions 4, 5 and 7 entitled them to withhold the SWAP Reports from respondents. The Court of Appeals, however, decided only the section 1104 issue, remanding the remainder of the case to permit the District Court to consider the effect of *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), an exemption 7 case, as well as "any

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5 (continued)

confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Pub. L. 93-502, section 2(b), 88 Stat. 1563 (1974); *See* H.R. Rep. 93-1380, 93d Cong., 2d Sess. 12-13 (1974).

other defense to disclosure [petitioners] may raise except Exemptions (1) and (3)." (App. 13A).

In ruling against petitioners on their claim that section 1104 is a statute which specifically exempts SWAP Reports from disclosure, the Court of Appeals pointed to the absence of any clear definition or description of documents to be covered by it, contrasting this with the "definite class of documents" withheld in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973). (App. 4A). It further noted that the FOIA was intended to replace the public interest standard under the prior law with a broad rule of disclosure subject to nine specific exemptions. (App. 8A-9A). It reasoned that to import via section 1104 a public interest test to be applied at the discretion of the FAA and the CAB would frustrate the goals of the Information Act. Based on these reasons, the Court of Appeals concluded that section 1104 was not a statute which "specifically exempted" the SWAP Reports, and thus exemption 3 did not apply. (App. 5A, 12A).

SUMMARY OF ARGUMENT

Exemption 3 permits agencies to refuse to disclose records based on exceptions created by other statutes, rather than on the terms of the other eight specific exemptions created by section 552(b). The question posed by this case is whether section 1104 is one of the statutes included within exemption 3, or more precisely, whether the SWAP Reports are "specifically exempted from disclosure by statute [section 1104]."

Respondents contend that section 1104 is not within the group of statutes that fall under exemption 3 because

it contains none of the characteristics found in those statutes which plainly do create exceptions to disclosure. Thus, section 1104 fails to qualify because

- it does not describe particularized records, but applies to any information in the possession of the FAA or the CAB;
- it does not prohibit the disclosure of any documents, but allows the FAA or CAB the discretion to refuse to disclose any document in their possession;
- it fails to set any standards for determining whether to release a particular document other than the "public interest" test which the FOIA was plainly intended to eliminate.

Both the legislative history of exemption 3 in particular and the FOIA in general support respondents' contention that these three aspects of a statute should be examined in resolving questions as to the applicability of exemption 3. In addition, this Court's decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), as well as decisions of the various courts of appeals in exemption 3 cases not involving section 1104, support the proposition that in determining whether section 1104 meets the requirements of exemption 3, these three factors should be considered. We do not argue here that the failure to have any one of these traits is itself a sufficient basis for ruling that a statute does not create an exemption from disclosure. However, the absence of all three characteristics is, we submit, fatal to petitioners' claim with respect to section 1104.

In our view, petitioners' attempt to rely on that part of the legislative history of exemption 3 relating to section 1104 is misplaced. The isolated references to section 1104 in the extensive legislative history of the FOIA have been given far greater import by petitioners than the contexts of the references indicate are warranted. In addition, certain other parts of the legislative history — such as the CAB's admission in hearings in 1963 that section 1104 does not fall within exemption 3 — affirmatively support the decision below.

Finally, there is no valid policy reason which has been advanced by petitioners to support a broad exclusion of the FAA and CAB from the FOIA through section 1104, particularly since no such exclusion exists for any other comparable agency. Even petitioners' suggestion that determinations under section 1104 are reviewable in the courts of appeals, does not alleviate the situation because that kind of review would create significant practical problems, would seriously impair the right to *de novo* review under section 552(a)(4)(B),[6] and in those cases where other exemptions are claimed, would create either simultaneous proceedings in a district court and a court of appeals, or would thrust upon the appellate courts the burden of trying all FOIA cases arising out of the FAA and CAB. Indeed, the existence of other exemptions, three of which have been vigorously pressed by petitioners in this case, militates heavily against a conclusion that vital secret records of the FAA and CAB would be jeopardized if the decision below were upheld. Any legitimate interest that petitioners have in keeping the public from examining safety reports on the practices of airlines is adequately protected by

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[6] Formerly section 552(a)(3).

the exemptions for confidential commercial and financial information (4), internal agency memoranda (5), or investigatory records compiled for law enforcement purposes (7). Those exemptions are available to the FAA just as they are to every other agency, and if Congress intended to permit the withholding of these SWAP Reports, it should be under the aegis of one of those exemptions rather than through a broad claim of non-disclosure based on section 1104.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE SWAP REPORTS ARE NOT "SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE" WITHIN THE MEANING OF EXEMPTION 3.

There is little question that exemption 3 to the FOIA was never intended to overrule those previously enacted statutes which specifically limited public access to certain documents. But all of the legislative history cited by petitioners simply establishes that undisputed proposition, and begs the real question which is whether exemption 3 was intended to apply to section 1104.

The beginning of this analysis is the wording of exemption 3, which covers matters that are "specifically exempted from disclosure by statute; . . ." As the Court of Appeals noted below: "The ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny." (App. 4A). *Accord, Cutler v. Civil Aeronautics Board*, 375 F. Supp. 722, 724 (D.D.C. 1974), *appeal pending*, No. 74-1780 (D.C. Cir.).

The overall thrust of the phrase and the use of the words "specifically," "exempted" and "by statute" all suggest a degree of concreteness which section 1104 plainly lacks. Indeed, there is little that is concrete about section 1104, since it applies to any information held by the agencies and can be invoked whenever it is determined that disclosure "is not required in the public interest."[7] The fact is that section 1104 literally does not exempt anything at all, but leaves that job to the agencies, contrary to exemption 3 which requires that non-disclosure be "by statute." What petitioners have done is to construe exemption 3 as though it were written to apply to matters "exempted from disclosure by a specific statute." While the words may be almost the same, the meaning is very different.

Respondents do not, however, rely solely on the wording of exemption 3. Rather, we have also analyzed various statutes plainly falling within exemption 3's coverage and identified three characteristics which are found in varying degrees in all of those statutes. In Point I, we demonstrate that section 1104 fails to meet any of these three traits and for that reason does not qualify under exemption 3. Thereafter, we review the extracts from the extensive legislative

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[7] Section 1104 also provides that the agency must make a "judgment" that release would "adversely affect the interests" of the person requesting non-disclosure. That requirement seems largely redundant because the agency almost necessarily would have to make such a judgment in order to find that release "is not required in the interest of the public." Moreover, the perfunctory showing needed to establish that the release of all SWAP Reports, for all airlines, forever, would "adversely affect" the interests of ATA and its members (A. 112-13), demonstrates that this language adds little to section 1104 or the protection of the public interest. Accordingly, we will treat section 1104 as though it contained only the "in the interest of the public" language.

history which petitioners claim support their case and demonstrate that none of it is helpful to them and that much of it supports respondents. Finally, in Point III, we argue that to bring section 1104 within the third exemption would seriously interfere with the operation of the FOIA and undermine its policies, and that any legitimate interest the agencies have in keeping these records secret can be achieved through the other exemptions that they have claimed.

I. SECTION 1104 IS NOT A STATUTE WHICH IS WITHIN EXEMPTION 3 BECAUSE (A) ITS COVERAGE IS GENERAL AND NOT PARTICULARIZED, (B) IT PERMITS NON-DISCLOSURE AND DOES NOT PROHIBIT DISCLOSURE, AND (C) THERE IS NO MEANINGFUL STANDARD FOR MAKING DETERMINATIONS AS TO DISCLOSABILITY.

A. The Coverage of Section 1104 is Broad and General Rather Than Particularized.

Section 1104 is written in extremely broad terms and permits the non-disclosure of "information contained in any application, report, or document filed pursuant to provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter . . . ." In short, any information in the files of the CAB or the FAA is subject to non-disclosure if petitioners are correct in their interpretation of exemption 3. It is the wholly open-ended nature of section 1104 that distinguishes it from all of the statutes which properly create exemptions under exemption 3. Thus, statutes clearly within the third exemption prohibit disclosure of tax returns (26 U.S.C. §6103), applications for patents (35 U.S.C. §122), documents pertaining to claims arising under the laws administered by the Veterans Administration (38 U.S.C. §3301) and "Restricted Data" (42 U.S.C.

§2162) as defined by 42 U.S.C. §2014(y). While there will inevitably be disputes about the meaning of even well-defined terms,[8] the limitation on access however construed is confined under those statutes to types of documents preselected by Congress and is not left entirely to the discretion of the agency, as is true under section 1104.

The legislative history of exemption 3 further supports respondents' contention that the all-inclusive nature of section 1104 disqualifies it as a specific exemption statute under section 552(b)(3). Thus, in 1958 in the Senate hearings, the Subcommittee's Chief Counsel observed that the 80 statutes which limit disclosure would not be affected by the pending legislation, S. 2148 [85th Cong., 1st Sess. (1957)], since subsection (f) of that bill contained an exemption for "subject matter which is (1) specifically exempt from disclosure by statute, . . ." In response, Senator Hruska stated:

> I am glad to know that. It emphasizes even more the point I've tried to make in questioning Mr. Newton. After all, that is a matter of policy when a *specific exception* is made, that is a matter of congressional policy.
>
> Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 921 (Part 2), 85th Cong., 2d Sess. 583 (1958) (emphasis added) (hereafter "1958 Senate Hearings").

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[8] *See, e.g., Sears v. Gottschalk*, 502 F.2d 122 (4th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3297 (Nov. 14, 1974) (No. 74-584) (applications for patents).

It is readily apparent that section 1104 does not contain a "specific exception" and that "congressional policy" could not have been involved because Congress had no idea what kinds of documents would be withheld given the open-ended nature of section 1104.

In 1963, two bills which were the forerunners of the FOIA were introduced in the Senate and referred to the Judiciary Committee. These were S. 1663, an all-inclusive revision of the Administrative Procedure Act ("APA"), and S. 1666, which amended only the information portion of the APA, section 3, 5 U.S.C. §1002 (1964). The information sections in both bills were identical and provided that every agency shall make its records promptly available "except those particular records or parts thereof which are (1) specifically exempt from disclosure by statute . . . ." While the phrase "particular records or parts thereof" was not contained in the bill as it became law, there is no indication anywhere of an intent to modify the substance of the bill by dropping that language. *Cf.* Pet. Br. at 18 n. 20.[9] In our view the use of the "particular records" phrase firmly supports our contention that statutes which qualify under the third exemption must describe with considerable particularity the type of records that may be withheld. Moreover, Senator Edward V. Long of Missouri, the Chairman of the Senate Subcommittee from which the FOIA came and a leading proponent of the Act, described the statutes which curtail the availability of information and which would not be affected by the bill, as laws

[9] Likewise, there is no significance in the fact that "exempt" in S. 1663 was changed to "exempted" when reported by the Judiciary Committee. Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1663, 88th Cong., 2d Sess. 3 (1964).

that "provide that *specified records* shall not be released unless authorized by law." Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666 and S. 1663 (in part), 88th Cong., 1st Sess. 6 (1963) (emphasis added) (hereafter "1963 Senate Hearings"). Even though the "particular records" phrase was not contained in the bill as reported to the House floor in 1966 (which was the bill as it became law), the portion of the House Report which dealt with the third exemption observed that these statutes "restrict public access to *specific government records.*" H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis added).

Petitioners' response is to point to this Court's decision in *EPA v. Mink, supra,* which dealt with what petitioners assert (Br. 14) is "another similarly structured exemption" to the FOIA, exemption 1, which at that time applied to matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. §552(b)(1) (1970).[10] They quite correctly observe that the Executive order involved in *Mink* did not "specifically" exempt the particular documents sought, or for that matter any others, and that this Court sustained the claim of exemption despite this fact. Therefore, petitioners argue, the absence of any specificity in section 1104 is not fatal to their claim that exemption 3 applies to it.

[10] Public Law 93-502, section 2(a), 88 Stat. 1563 (1974), amended that provision so that it now exempts only matters that are:

> "(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

Petitioners' attempt to equate the two exemptions, and thereby to gain support from *Mink*, passes over significant differences between the two provisions. First, old exemption 1 and the Executive order were, unlike exemption 3 and section 1104, specific in one important respect: their application was limited to matters of "national defense and foreign policy," a far more limited scope than "any information" in section 1104. *Cf.* 42 U.S.C. §2014(y); 38 U.S.C. §3301. Second, and essential to this Court's decision in *Mink*, was the legislative history which unmistakenly pointed to the conclusion that Congress intended not to permit the disclosure under the FOIA of documents classified on the authority of the very Executive order utilized in *Mink* to withhold the documents. *See* 410 U.S. at 82-83; *Stretch v. Weinberger*, 495 F.2d 639, 641 (3d Cir. 1974).

Finally, we have found no indication in the legislative history that any attempt was made to give the same meaning to an exemption dealing only with national security matters, as that given another exemption which covers an entire range of federal statutes on a variety of subjects. In fact, if Congress had wished to give the identical interpretation to both exemptions, the simplest and most direct way of doing so would have been to add the phrase "or required by Executive order to be kept secret in the interest of national defense or foreign policy" at the end of exemption 3.[11] That was not done, and

[11] We do agree that once a statute is found to come within exemption 3, the courts may only determine whether the exemption is properly claimed as to the documents sought, but may not examine the wisdom of the Congressional decision to withhold. *See, e.g., Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350 (D.C. Cir. 1974).

there is no apparent reason why Congress would have wanted to treat two such different subjects in precisely the same manner. Despite the similarity between the two exemptions, the differences in scope, legislative history, and purpose are sufficient to render the holding in *Mink* inapplicable to exemption 3 and section 1104.

Petitioners cite a number of other statutes which they claim fall under exemption 3 and are similar to section 1104. But of these, only two — 15 U.S.C. §78x(b) and 42 U.S.C. §1306(a) — even approach section 1104 in their lack of specificity. Even if they do fall within exemption 3, a point we do not concede, both of them are more specific than section 1104. For instance, section 78x(b) applies only to information contained in an "application, report, or document filed with [the Securities and Exchange] Commission under this chapter." Section 78x(a). The SEC has interpreted that provision to apply only to information in documents "formally filed" with it, *see* 40 Fed. Reg. 4944 n.1 (February 3, 1975), whereas section 1104 extends to "any information" in the possession of the FAA or the CAB. Furthermore, under section 78x(b) only the person who filed the particular document may seek a non-disclosure order, but section 1104 allows any person to object to the disclosure of any information. In this case that distinction is extremely important since the SWAP Reports were all prepared by FAA inspectors, and yet it is the air carriers and their trade association which requested the non-disclosure.

With regard to the other statute, 42 U.S.C. §1306(a), we note that the Third, Fifth, and District of Columbia Circuits have held that it did not specifically create an exemption, and that only the Ninth Circuit, by a two to one vote,

has held to the contrary.[12] Moreover, that provision does have some additional degree of specificity beyond that in section 1104. In a portion of the statute not quoted by petitioners in their brief, section 1306(a) exempts from disclosure "any return . . . filed with the Commissioner of Internal Revenue . . ." before going on to the more general reference to "any file, record, report or other paper, or any information . . . ." Thus, at least as to returns filed with the IRS, section 1306(a) is more specific than section 1104 and thus might arguably create an exemption to that limited degree, particularly in light of the other distinguishing features of section 1306(a) related to the other traits of exemption 3 statutes discussed *infra*.

* * *

The court below was plainly correct in its determination that the statute referred to in exemption 3 "must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny." (App. 4A). Not only was that interpretation of the words of the third exemption correct, but the legislative history of that provision firmly supports that view, and therefore, section 1104 fails to meet the single most important test of an exemption 3 statute.

B. Section 1104 Does Not Qualify Under The Third Exemption Because It Does Not Prohibit Disclosure, But Only Permits Discretionary Non-Disclosure

Petitioners contend that the third exemption applies regardless of whether the statute prohibits disclosure, permits non-

[12] *Stretch v. Weinberger, supra; Serchuk v. Weinberger*, 493 F.2d 663 (5th Cir. 1974); *Schechter v. Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974). *Contra, People of California v. Weinberger*, 505 F.2d 767 (9th Cir. 1974).

disclosure, or conditions disclosure or non-disclosure on satisfying certain criteria. We agree only to the extent of acknowledging that a statute which does not prohibit disclosure absolutely may still meet the tests of the third exemption. But the failure to prohibit disclosure is one factor that must be considered in determining whether Congress intended the particular statute to come within exemption 3.

Some statutes, such as 22 U.S.C. §987 and 50 U.S.C. §403g, are written in terms that plainly prohibit public access to the documents covered by them. On the other end of the spectrum is section 1104, which equally plainly is not prohibitory, and thus records covered by it are, arguably, for that reason alone not "specifically exempted from disclosure by statute." Indeed, the distinction between prohibitory and non-disclosure language was recognized in the only case which held that section 1306(a) entitled the Government to withhold the nursing home reports sought there. *People of California v. Weinberger, supra*, 505 F.2d at 768:

> We do not believe that Section 1306 was an "authorization for administrative exemption," but if we did we would agree with the conclusion reached in *Stretch*. We think the words of Section 1306, "no disclosure . . . shall be made," are words of congressional exemption which prohibit disclosure and the words "except as the Secretary . . . may by regulation prescribe" are words allowing the Secretary to relax the absolute prohibition enacted by Congress . . . . there is a real difference between a statute in which the congressional words themselves prohibit disclosure and a

> statute which authorizes an administrator to exempt from disclosure. In the latter case the exemption is the creature of the administrator and does not fall within the meaning of the words "specifically exempted . . . by statute." [footnote omitted].

In our view the distinction drawn is a sound one and should be considered, along with the other factors, in evaluating whether a statute comes within the third exemption.[13]

Finally, with regard to section 1104 itself, we note that the absence of any prohibitory language, coupled with the open-ended nature of the information covered by it, has allowed petitioners to claim that all past, present, and future SWAP Reports cause harm to the persons who made

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[13] To support their contention that the third exemption covers statutes permitting discretionary disclosure of information, petitioners refer to 13 U.S.C. §8 which permits discretionary disclosure of limited specified categories of census information. Petitioners state that during the debates on the bill Congressman Moss "agreed that exemption 3 covered information obtained by the Bureau of the Census. 112 Cong. Rec. 13646 [1966]." (Pet. Br. 21). An examination of that debate demonstrates, however, that Congressman Moss agreed only that census material which is exempt from disclosure by a prohibitory statute (13 U.S.C. §9) would not be affected by the FOIA, a proposition with which we are in total accord. There is no mention of 13 U.S.C. §8, nor does petitioners' brief point out the very limited nature of the categories of documents which can be disclosed pursuant to that provision. The discretionary nature of 13 U.S.C. §8 in no way contradicts our position, which is only that a prohibition on disclosure is one factor, albeit an important one, in determining whether the requirements of the third exemption are met.

the non-disclosure request, and that it will never be in the public interest to disclose any of these Reports. Quite apart from the total lack of a factual basis for such a prediction, the result is difficult to square with section 552(b)(3) which applies only when matters are "specifically exempted from disclosure by statute."

C. The Absence Of Any Standards Other Than "the interest of the public" In Determining the Disclosability Of Any Records, Further Establishes That Section 1104 Is Not Within The Ambit of Exemption Three.

The third factor to be considered is whether section 1104 contains appropriate standards for the exercise of such discretion as there may be vested in the Administrator for making withholding decisions. We do not argue that the absence of standards is itself sufficient to disqualify a statute from the reach of exemption three. We do not contend that a provision such as 38 U.S.C. §3301(8), which allows the Administrator of the Veterans Administration to release information concerning a claim where it would "serve a useful purpose", takes the entire statute out of exemption 3 because it is both limited to a specific class of documents and prohibits disclosure, subject to certain exceptions.[14]

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[14] On the other hand, more definite provisions such as section 2162(b) of Title 42, which allows Restricted Data to be released to the public when it can be published "without undue risk to the common defense and security", or 26 U.S.C. §6103(b)(2), which allows certain State officials to inspect tax returns "for the purpose of [the] administration [of the State's tax laws] or for the purpose of obtaining information to be furnished to local taxing authorities as provided in this paragraph", are clearer indications of statutes meeting the requirements of the third exemption.

It was the absence of any standard for determining disclosability that led the Third Circuit in *Stretch v. Weinberger, supra,* to conclude that section 1306(a) was not a proper exempting provision. That court agreed with the contention of the plaintiffs "that the exempting statute must prescribe some basis upon which the Secretary is to decide. Otherwise . . . 'specifically' . . . is surplusage." 495 F.2d at 640. The court further observed that there must be "standards or guides through which legislative judgment would be reflected in the making of administrative exemptions." *Id.* Based on its analysis of the legislative history of the FOIA, the court concluded that "the absence of standards to govern broad agency discretion was the chief evil at which Congress aimed." *Id.* at 641. It was the absence of any standards in section 1306(a) — the Secretary is simply authorized to prescribe exemptions by regulation — which was a key factor in deciding against the government in *Stretch,* and it is also a substantial factor in the present case where the only standard is that disclosure "is not required in the interest of the public."

This Court in *EPA v. Mink, supra,* thoroughly reviewed the legislative history of the FOIA and the reasons that its predecessor provision, section 3 of the APA, "came to be looked upon more as a withholding statute than a disclosure statute." 410 U.S. at 79.[15] This Court observed

[15] Section 3 of the APA, 5 U.S.C. §1002, provided as follows:

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of the agency –
>
> * * *
>
> (c) Public Records – Save as otherwise required by statute, matters of official record shall in accordance

(continued)

that section 3 has been "plagued with vague phrases" such as the public interest and found that the nine exemptions "are plainly intended to set up concrete, workable standards for determining whether particular materials may be withheld or must be disclosed." *Id.* It thereafter cited both the Senate and House Reports, which stated that one of the basic purposes of the FOIA was the abolition of the public interest test, as well as other legislative history supporting this proposition. The legislative history on the intent to abolish the public interest standard is so extensive that respondents concluded that it could be best presented in the separate Addendum A annexed hereto which sets forth the most significant examples. The eleven year legislative history of the FOIA is best summarized in a statement made during the final House debate by Congressman Rumsfeld, a member of the Subcommittee and one of the sponsors of the bill:

> This legislation is intended to mark the end of the use of such phrases as "for good cause found", "properly and directly concerned", and "in the public interest", which are all phrases which have been used in the past by individual officials of the executive branch in order to justify or at least to seem to justify withholding of information that properly belongs in the hands of the public. 112 Cong. Rec. 13654 (1966).

Yet it is apparent that if petitioners' interpretation of exemption 3 and section 1104 prevails, the public interest

[15] (continued)
with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

test, which Congressman Rumsfeld and others intimately concerned with the development of the FOIA sought to eliminate, will have been resurrected once again. It simply makes no sense, we submit, to bring about indirectly that which Congress worked so long and hard to prohibit directly when it repealed section 3 of the APA.

* * *

This analysis of section 1104 from the point of view of these three factors demonstrates that section 1104 is very different from those statutes that are plainly covered by exemption 3; it contains neither a reference to particularized records, nor an absolute or even qualified prohibition against disclosure, nor does it establish any meaningful tests for determining when a document should be made available to the public. While it may be that none of these factors alone would disqualify a particular statute, the absence of all three demonstrates that section 1104 is not a statute under which any document, including SWAP Reports, is "specifically exempted."[16]

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[16] In *Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), the court in a brief alternative holding ruled that the identity of an informant could be withheld by the FAA under section 1104. The opinion never discussed the question of whether section 1104 is a statute covered by the third exemption; it simply held that the materials sought in *Evans* fell within section 1104. Judged by the exemption 3 portion of the petition for certiorari in *Evans*, which dealt solely with whether the standards of section 1104 had been met (No. 71-698 at 15-16), it appears that the plaintiff simply assumed that section 1104 was covered by exemption three and that the arguments advanced here were never urged upon any court in that case.

II. THE LEGISLATIVE HISTORY RELIED ON BY PETITIONERS DOES NOT SUPPORT THE INCLUSION OF SECTION 1104 UNDER EXEMPTION 3.

In Point I, we relied on portions of the legislative history of the FOIA to establish that there are three criteria by which each statute seeking qualification under exemption 3 must be judged, and we concluded that section 1104 fails to qualify in any of these three categories. We now turn to three arguments that petitioners make (Br. 23-25), none of which is based on the primary legislative history of the FOIA – the committee reports, floor debates, or statements of the bills' sponsors. Two of them are based on materials submitted to congressional committees and included only as appendices to the hearings' records, and the third is premised upon a series of inferences drawn from a list of statutes which does *not* include section 1104 and as to which there is substantial doubt about its relevance in interpreting the third exemption. In our view a close examination of these three items indicates that they do not support petitioners. Moreover, a CAB letter to Congress concerning the FOIA similar to those relied on by petitioners, but not cited by them, supports respondents by its admission that section 1104 is not specific enough to meet the requirements of exemption 3.

The House Report states that "there are nearly 100 statutes or parts of statutes which restrict access to specific government records [which] would not be modified" by exemption 3 (H.R. Rep. No. 1497, *supra*, at 10), thereby suggesting that there might be a list of such statutes which would resolve all questions under the third exemption. The search for such a list, however, has proven unavailing. Petitioners point to a statement in the 1965 House hearings in which Congressman Moss referred to a

1960 list of statutes,[17] entitled Federal Statutes on the Availability of Information, 86th Cong., 2d Sess. (1960) (hereafter "1960 Compilation"), and it is from that list that petitioners seek support for their position. (Br. 24-25).

In the first place section 1104 is not on that 1960 Compilation which Congressman Moss described as "a very comprehensive document." 1965 House Hearings at 20. In addition, at that same point in the hearings, Congressman Moss in an apparent reference to the 1960 Compilation indicated that there were "some 78 statutes which confer authority for withholding of information", *id.*, a different figure from the "nearly 100" mentioned in the 1966 House Report, but a similar total to that advanced by committee counsel in the 1958 Senate Hearings of "around 80 separate statutes." 1958 Senate Hearings (Part 2) at 583. The reliability of any of these lists is further confused by the reference in the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 31-32 (1967), where he suggested that the reference to the "nearly 100 statutes" in the House Report was to a 1962 Survey by the Administrative Conference. The conference now asserts that, while the survey was started in 1962, "it was never completed and therefore there is no list of 'nearly 100 statutes'." Addendum B at Add. 14, *cited with approval in Cutler v. CAB, supra*, 375 F. Supp. at 723 n.1. In short, there is no authoritative list of statutes coming within exemption 3, and hence petitioners' argument which is based on an inference to be drawn about a statute which is *not* on the 1960 Compilation, because of

[17] *See* Hearings Before a Subcommittee of the House Committee on Government Operations (Part 1), 89th Cong., 1st Sess. 20 (1965) (hereafter "1965 House Hearings").

the inclusion on that Compilation of two other statutes which they argue are "similar" to section 1104, should be rejected by this Court.[18]

To support their position on section 1104, petitioners also refer to an exhibit which was appended to the record in the 1958 Senate Hearings held by the Subcommittee on Constitutional Rights. Two days after the hearings were completed, the American Law Division of the Library of Congress transmitted to the Subcommittee an exhibit which listed section 1104 (then 49 U.S.C. §674) as one of the "Miscellaneous provisions imposing restrictions on the release of information." 1958 Senate Hearings (Part 2) at 987, 1017.[19] Because that exhibit did not

[18] Even if section 1104 were in the 1960 Compilation, that would not be dispositive since three of the four courts of appeals which have considered the inclusion of 42 U.S.C. §1306(a) under exemption 3, have rejected the Government's position (*see* note 12, *supra*), although that provision is included on the 1960 Compilation (p. 266). *See also Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 n. 5 (D.C. Cir. 1970) (suggesting that 18 U.S.C. §1905, which is listed in the 1960 Compilation (p. 262). may not fall within exemption 3). Furthermore, the two statutes cited by petitioners in their brief (pp. 24-25) – 26 U.S.C. §6104(a)(1)(B) and 15 U.S.C. §78x(b) – are not similar to section 1104, the latter for the reasons set forth at page 19, *supra*, and the former because it is specifically limited to preventing disclosure of any "trade secret, patent, process, style of work, or apparatus" held by certain tax exempt organizations.

[19] Those Hearings dealt principally with executive privilege and the authority of the executive to withhold information from Congress under the Housekeeping Statute, 5 U.S.C. §22 (now 5 U.S.C. §301). Moreover, none of the Senators or staff who were on the Subcommittee which conducted those hearings served on the Subcommittee on Administrative Practice and Procedure from which the FOI bill emerged and was passed in the 89th Congress. Indeed, only two members of that 1958 Subcommittee were still in the Senate when the FOIA became law.

arrive until after the hearings were concluded, it was never mentioned in them, nor to our knowledge, referred to again in the eight subsequent years that it took Congress to enact the FOIA. Far more damaging, however, is the absence of section 1104 from the 1960 Compilation relied on by petitioners, even though it was prepared by the very same American Law Division of the Library of Congress which compiled the exhibit submitted for the record in the 1958 Senate Hearings. Arguably, section 1104 is a statute which "impos[es] restrictions on the release of information" as the exhibit suggests, but exemption 3 requires that the information be "specifically exempted from disclosure by statute" which is a very different standard. In any event, petitioners' assertion (Br. 23) that "any doubt [of that inclusion] is dispelled by the fact that Section 1104 was listed in an exhibit submitted during the [1958] Hearings" is, to say the least, an overstatement.

Petitioners also claim support (Br. 24) from the CAB's statements to Congress of its understanding that section 1104 was encompassed by exemption 3, and in the fact that this interpretation was never challenged in either House. A further analysis of the relevant facts demonstrates, however, that no such "acquiescence by silence" can be implied here, even if it might be appropriate in other situations. Thus, in the 1965 House Hearings relied on by petitioners, there is no more than a letter from the CAB to the Chairman of the Committee on Government Operations stating that "the Board assumes that the exemption from disclosure covering matters 'specifically exempted *** by statute' would be applicable to its procedures under sections . . . 1104. . . ." 1965 House Hearings at 237.[20] The

[20] It is also instructive to note that the FAA, one of the petitioners here, wrote to the House Committee on Government Operations at (continued)

basis for that assumption is by no means clear since the 1960 Compilation, which was the only one referred to in those hearings and which Congressman Moss described as a "very comprehensive document" (1965 House Hearings at 20), did not include section 1104. Furthermore, the CAB opposed the pending bill notwithstanding its assumed protection based on section 1104, an opposition which would have been unnecessary if section 1104 created the exemption that the CAB said that it did. Given this state of the record, it is hardly relevant that no "challenge" (Pet. Br. 24) to a letter buried in a hearing record was ever issued by the bill's supporters.

Petitioners' argument with respect to the similar letter written to the Senate is even less persuasive. The letter was written in 1965, the year after the Senate passed S. 1666 which in all material respects was identical to the bill which eventually became the FOIA when it was passed in 1966. Thus, the CAB's letter arrived much too late to be of any significance in understanding the Senate's intention with regard to the third exemption. But far more important is the fact that on October 23, 1963, when the language of exemption three in the bills pending in the Senate

[20] (continued)
the same time as did the CAB, but surprisingly made no mention of section 1104 in commenting on the pending legislation. 1965 House Hearings at 238. Moreover, the chief complaint that the FAA raised in opposition to the bill was that it eliminated the discretion which the agency had and which it believed was being properly exercised at that time. Yet it is obvious that if the pending legislation, which contained exemption 3 in the same form as finally enacted (*see* p. 17, *supra*), made no changes in the operation of section 1104, the elimination of agency discretion would have been of no concern to the FAA. Thus, it appears that the FAA did not consider section 1104 to afford it any protection under exemption 3.

was virtually identical to the text as finally enacted,[21] the CAB wrote to the Chairman of the Senate Judiciary Committee, with regard to the very problem at issue here:

> Further, it may be argued that the enactment of S. 1666 would have the effect of repealing sec. 1104, since S. 1666 would require the disclosure of records not "specifically exempt from disclosure by statute" and since sec. 1104 is a grant of authority to withhold from disclosure rather than a specific exemption for named records.
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> Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666 and S. 1663 (in part), 88th Cong., 1st Sess. 247 n.1 (1963).

That candid admission by the Vice-Chairman of the CAB casts considerable doubt on petitioners' argument that the legislative history of the FOIA supports the withholding of the SWAP Reports based on section 1104.

III. THE OPERATION OF AND THE POLICIES BEHIND THE FOIA WILL BE ENHANCED BY HOLDING THAT SECTION 1104 IS NOT INCLUDED WITHIN THE STATUTES COVERED BY EXEMPTION THREE.

Petitioners have failed to advance a single reason why Congress would have intended to permit the FAA and the CAB to operate outside of the Freedom of Information Act

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21 *See* note 9, *supra.*

by establishing their own public interest standards for determining whether any document should be disclosed to the public. Especially in light of the clear congressional intent to eliminate the public interest standard from determinations on disclosability of public records (*see* Addendum A), the absence of any affirmative history to support the inclusion of this standard for just these two agencies through section 1104 is solid evidence that Congress never intended these two agencies to be treated differently than all the others. Petitioners have asserted that "each nondisclosure statute was enacted by Congress after balancing the need for public access to information against the need for confidentiality with respect to a particular agency" (Br. 22), yet they have failed to show any special need for confidentiality in these two agencies. Nor have they shown that Congresss made the kind of particularized balancing which this Court recognized in *EPA v. Mink, supra,* 410 U.S. at 80, as the basis for creating all FOIA exemptions. Indeed, Congress could not have done so with section 1104 because of the open-ended nature of the documents covered by it and inclusion of the broad public interest standard. Other agencies are also concerned with safety and economics for other modes of transportation, but not one of them has a provision similar to section 1104. Furthermore, knowledge of how the FAA and CAB are carrying out their vital safety and economic duties is of paramount importance to hundreds of millions of airline passengers.[22]

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22 The FAA's duties include overseeing the operations of airports, giving directions to air controllers, pilots, and navigators, and issuing air safety standards for aircraft. While the role of the CAB is less a matter of life and death than the FAA's, its impact on the economics of the airline industry and the travelling public is a significant factor in the overall transportation pattern in this country. *See* pp. 3-4, *supra.*

Petitioners, however, argue that an affirmance of the decision below "would impair the Federal Aviation Administration's ability properly to perform its investigative functions" (Br. 11), and would seriously interfere with its ability "to prevent or correct unsafe conditions before an accident occurs." (Br. 26). According to petitioners, if the holding below is sustained, "the SWAP program will be seriously impaired" *Id.* These assertions assume that section 1104 is the only defense available to petitioners in the action. But the FAA, like every other law enforcement agency, may protect its investigatory records to the extent that Congress has authorized in exemption 7. Furthermore, if the information is confidential and commercial, as it may be for some records of the CAB, exemption 4 offers significant protection from disclosure. Finally, of particular interest here since the documents sought are internally generated, exemption 5 protects intra-agency memoranda, a defense which has also been vigorously pressed by petitioners. To the extent that any protection is required from public disclosure of the SWAP Reports, they are provided ample shelter by the other specific exemptions without resorting to the broad sweep of section 1104.

In fact, the existence of other exemptions produces major practical problems if the view of petitioners as to the scope of section 1104 and its relation to the FOIA prevails. Petitioners acknowledge in this Court (Br. 26 n. 26) that judicial review is not foreclosed by section 1104, but they argue that citizens can seek redress only in a court of appeals pursuant to 49 U.S.C. §1486. Under that approach the court of appeals would have to evaluate the agency's public interest determination, a result that would be in conflict with the Congressional purpose "to set up

concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *EPA v. Mink, supra,* 410 U.S. at 79. Moreover, the determination in this case, as is often true, was *ex parte;* the order included future as well as past SWAP Reports and even was extended to airlines that were not included in ATA's request. But without a meaningful administrative record to justify such an all-inclusive order, respondents' right to judicial review would be almost useless.[23]

The existence of other exemptions creates further practical problems. Would those exemptions be heard in the court of appeals, and if so would there be a *de novo* determination, including a trial on factual matters such as those raised under claims of the fourth exemption. *See, e.g., National Parks & Conservation Association v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). And if the other issues were not to be determined in the first instance by the court of appeals, would there be a bifurcated proceeding under which some exemptions would be tried in one court and others in another court, and if so, which court would make which determination first? While it is possible that those issues could be sensibly resolved if it were necessary, there is no reason to believe that Congress ever intended to establish such a procedural quagmire when it included exemption 3 in the Freedom of Information Act. Given these illogical results, the proper method of eliminating them is by specifically excluding section 1104 from exemption 3.[24]

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[23] Petitioners do not indicate whether the FOIA's right to *de novo* review or the more limited review under section 1486 would apply in these cases.

[24] It is true that statutes should not normally be interpreted to be repealed by implication and that it is preferable to construe a

(continued)

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals with respect to section 1104 should be affirmed, and the case remanded to that Court for further proceedings with respect to the other exemptions claimed by petitioners.

Respectfully submitted,

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March, 1975

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[24] (continued)
statute such as exemption 3 to permit the other provision (section 1104) to have continuing vitality. In our view section 1104 is not stripped of all meaning but continues to have applicability with respect to those records which the exemptions to the FOIA permit the FAA or CAB to withhold, but which the agency is considering exercising its discretion to release. In such instances, section 1104 establishes a procedure under which the agency can be asked to exercise its discretion not to release those documents which are neither mandatorily disclosable, nor whose public dissemination is prohibited. *See Charles River Park "A", Inc. v. Department of Housing and Urban Development*, ___ F.2d ___, No. 73-1930 (D.C. Cir., March 10, 1975).

ADDENDUM A

THE LEGISLATIVE HISTORY OF THE DEMISE OF THE PUBLIC INTEREST STANDARD FOR WITHHOLDING AGENCY RECORDS

One of the dominant themes throughout the eleven year history of the Freedom of Information Act was the need to extirpate the phrase "secrecy in the public interest" which had been largely responsible for section 3 of the Administrative Procedure Act, 5 U.S.C. §1002 (1964),* becoming more of a withholding statute than a disclosure statute. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973). Thus, the Senate Report on the FOIA stated:

> Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as — "requiring secrecy in the public interest," . . . .

---

* "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency –

* * *

(c) Public Records – Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

> It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . . S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

Criticism of the "public interest" standard began in 1955 when the House established the Special Subcommittee on Government Information to examine problems of Executive Branch withholding. At the first hearing of that Subcommittee, counsel for the American Society of Newspaper Editors testified that one of the principle problems was "language so loose, vague and destitute of standards as to constitute vertiable caves of the winds wherein the weathervane of departmental and administrative interpretations and discretions have free scope to veer about." Hearings before a Subcommittee of the House Committee on Government Operations on the Availability of Information from Federal Departments and Agencies (Part 1, Panel Discussion with Editors, *et al.*), 84th Cong., 1st Sess. 11 (1955). In particular, the witness identified section 3 of the APA as a source of the difficulty:

> There are no definitions or standards concerning the term "public interest" but it evidently does not mean national defense or security or Congress would have said so . . . . As the American Law Section of the Library of Congress has pointed out, the "several qualifications in that act have enabled agencies to assert the power to withhold practically all the information they do not see fit to disclose." *Id.* at 12.

The attempt to eliminate the public interest standard continued the following year:

> Does the exception of "any function of Government requiring secrecy in the public interest" create or recognize an administrative discretion to withhold anything the agency believes it would be contrary to the public interest to disclose? I think this exception enlarges the area of sanctioned secrecy in that it permits administrative discretion to suppress in this area.
>
> Statement of Harold Cross, Counsel, American Society of Newspaper Editors, Hearings before a Subcommittee of the House Committee on Government Operations on the Availability of Information from Federal Departments and Agencies (Part 3, Panel Discussion with Legal Experts), 84th Cong., 2d Sess. 447 (1956).

Professor Bernard Schwartz testified:

> In the first place, there is the broad exception at the beginning of section 3 of the Administrative Procedure Act, making all its provisions — of course including the subdivision [3(c)] — inapplicable "to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." It is not contended that some such exception to the public information section of the act is not necessary.

> One wonders, however, whether it is not too broadly drawn; under it, the departments and agencies can, if they wish, immunize any function from public inspection simply by asserting that the public interest requires it.
>
> * * *
>
> . . . the Administrative Procedure Act should be amended to make it clear that the qualifications in the law are not intended to enable agencies to withhold practically all information they do not see fit to disclose. *Id.* at 459-60.

See also id. at 477 (testimony of John B. Gage); *id.* at 512 (colloquy between Congressmen Moss and Meader and witnesses); *id.* at 559 (colloquy between Congressman Meader, Committee counsel, and witnesses).

Legislation to amend section 3 of the APA was introduced in 1957. H.R. 7174, 85th Cong., 1st Sess.; S. 2148, 85th Cong., 1st Sess. Senator Hennings, the author of S. 2148, explained his bill:

> Part of the explanation for this perversion of section 1002's original purpose seems to lie in the way the section presently reads. Some of its terms and phrases are vague and undefined, giving agency officials wide latitude in interpreting and applying them. Included among these terms and phrases are: (1) "any function . . . requiring secrecy in the public interest."
>
> * * *
>
> The amendments now proposed are

> aimed at tightening the language of section 1002 by replacing those loose terms and phrases with language of more definite meaning, and making it clear beyond any doubt that the basic purpose of the section is to insure the dissemination of the maximum amount of information reasonably possible.
>
> 103 Cong. Rec. 7492 (1957).

Supporters of this precursor of the FOIA welcomed the proposal to replace "secrecy in the public interest" and other "woolly" phrases with specific exemptions. Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 921 and the Power of the President to Withhold Information from the Congress (Freedom of Information and Secrecy in Goverment), 85th Cong., 2d Sess. 539, 697, 739, 754, 757 (1958) (statements, letters, and editorials from Sigma Delta Chi Professional Journalistic Fraternity, the San Diego Evening Tribune, the Buffalo Courier Express, the Ithaca Journal, and the Chairman of the Ohio Wesleyan University Department of Journalism). Again in 1959, Senator Hennings introduced FOI legislation (S. 186, 86th Cong., 1st Sess.) with a nearly identical statement to the one he had made on S. 2148. 105 Cong. Rec. 402-03 (1959). And when Senator Carroll introduced an FOI bill in 1961 (S. 1567, 87th Cong., 1st Sess.), he commented: "Section 3 [of the APA] presently excepts from its publication requirements 'any function of the United States requiring secrecy in the public interest' . . . . These phrases are eliminated as being too ambiguous." 107 Cong. Rec. 5604 (1961).

Work on an FOI bill began in earnest in the Senate in the 88th Congress. Once again both witnesses and Senators decried the public interest standard — "the language that has plagued Congress and litigants ever since the law [the APA] passed." Testimony of the Dean of the University of Missouri School of Journalism, Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666 and S. 1663, 88th Cong., 1st Sess. 10 (1963).* *See also id.* at 48 (statement of Senator Metcalf); *id.* at 56 (testimony of witness appearing on behalf of American Newspaper Publishers Association); *id.* at 62 (testimony of witness appearing on behalf of American Society of Newspaper Editors); *id.* at 155, 157 (testimony of witness appearing on behalf of the American Bar Association).

Indeed, the course of S. 1663 and S. 1666 reveals how utterly repugnant Congress considered any use of the public interest standard in making determinations as to the availability of agency records. These bills were structured so that subsection (a) of section 3 dealt with information to be published in the Federal Register; subsection (b) dealt with agency opinions, orders, and rules; and subsection (c) dealt with agency records. Each subsection had its own self-contained set of exemptions. One of these in subsection (a) exempted "any function of the United States requiring secrecy in the public interest." The Committee Counsel explained that this language had been left intact from section 3 of the APA because "there have been virtually no criticisms of what has been included in the Federal Register, and most of the criticisms that there have been is that there has been too much in it, rather than too little." *Id.* at 113.

* S. 1663 was an overall revision of the APA; S. 1666 dealt only with public information and was identical to section 3 of S. 1663.

Despite this benign motivation and the fact that the secrecy in the public interest clause was applicable only to Federal Register publication, the inclusion of this language anywhere in an FOI bill was vigorously opposed. The witness who elicited Committee Counsel's explanation replied:

> I just am not happy about using that criteria "public interest" as being some sort of criteria for determination by administrators. It is subject to abuse. *Id.*

See also id. at 36 (statement of Senator Ervin); *id.* at 61 (testimony of witnesses appearing on behalf of American Society of Newspaper Editors); *id.* at 155, 157 (testimony of witness appearing on behalf of the American Bar Association). These protests were well received; on April 20, 1964, the Subcommittee released a revised Committee Print of S. 1663 which deleted "secrecy required in the public interest" in subsection 3(a). Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1663, 88th Cong., 2d Sess. 2 (1964).

Although this episode marked the last time that the public interest standard was included in proposed FOI legislation, proponents of its elimination continued to press their views on Congress. When the House Subcommittee held hearings in 1965, Congressman Moss engaged in the following colloquy with the witness representing the American Bar Association:

> Mr. Moss. It seems to me that after 10 years of rather careful consideration of this problem that there is never difficulty in finding it in the public interest to withhold for good cause found. There is a tent large enough to contain everything. . . .

Mr. Benjamin . . . . we are of course delighted to see that phrases like "in the public interest" or "for good cause" are not in this bill, nor were they in S. 2335 or the Senate bills.

These get down to deal with particular reasons for allowing nondisclosure in specific kinds of cases where that is justified.

Mr. Moss. It has been suggested we should go back to "public interest" or "for cause." But actually, we could change it and say "for any reason," could we not?

Mr. Benjamin. Just about —

Hearings before a Subcommittee of the House Committee on Government Operations on H.R. 5012, *et al.* (Part I), 89th Cong., 1st Sess. 104 (1965).

The witness appearing on behalf of the American Society of Newspaper Editors commented:

> We feel . . . that it [H.R. 5012] narrows the discretion, and properly so, which the administrative agencies could exercise.
>
> One of the lessons that has become increasingly apparent to us in experience with the Administrative Procedure Act in particular is that too much discretion was left in the hands of the individual agencies.
>
> * * *
>
> We feel the ambiguous phrases in the act provide, as I indicated earlier, too much discretion, not too little, and we feel that the

> legislation of the general type which is being considered here . . . narrows the discretion. *Id.* at 125-26.

See also Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary on S. 1160, *et al.*, 89th Cong., 1st Sess. 131, 513 (1965) (representatives of the American Society of Newspaper Editors and the American Newspaper Publishers Association).

The House and Senate Reports on the FOIA reflected the views of the witnesses cited above. Among the three purposes of the Act cited by the House Report was the intention to establish "workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases 'good cause found,' 'in the public interest' and 'internal management' with specific definitions of information which may be withheld." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966). In contrast, the problems with the old APA were summarized in this way:

> In a sense, "public information" is a misnomer for 5 U.S.C. 1002, since the section permits withholding of Federal agency records if secrecy is required "in the public interest" . . . . The present statute, therefore, is not in any realistic sense a public information statute. *Id.* at 5.

The Senate Report is just as explicit:

> Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards — or, more precisely, lack of standards — in section 3. It would require almost

no effort for any official to think up a reason why a piece of information should be withheld (1) because it was in the public interest . . . . S. Rep. No. 813, *supra*, at 5.

The phrase "public interest" in section 3(a) of the Administrative Procedure Act has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended — the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion. Retention of such an exception in section 3(a) is, therefore, inconsistent with the general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with Federal agencies. *Id.* at 8; *see id.* at 3 (Add. 1-2, *supra*).

The floor statements of the proponents of the bill show just as clearly as the Reports that the public interest test was eliminated because it is an insufficient standard for withholding information. Congressman John Moss, the Chairman of the House Subcommittee on Foreign Operations and Government Information and principal sponsor of the FOI bill, called the "secrecy in the public interest" clause and other vague phrases in section 3 of the APA "the warp and woof of the blanket of secrecy which can cover the day-to-day administrative actions of the Federal agencies," 112 Cong.

Rec. 13642 (1966). He went on to list three major changes which the FOI bill would make in the law, one of which would be to "set up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases 'good cause found,' 'in the public interest,' and 'internal management' with specific definitions of information which may be withheld." *Id.*

Congressman Reid of New York, who was also a member of the Subcommittee and had introduced an FOI bill identical to the Moss bill, regarded the secrecy in the public interest clause as the most important of the qualifications to section 3 which had vitiated its usefulness as a public information statute. *Id.* at 13646. Congressman Fascell, also a sponsor of FOI legislation, commented:

> The whole of section 3 may be rendered meaningless because the agency can withhold from the public such information as in its judgment involves "any function of the United States requiring secrecy in the public interest." This phrase is not defined in the law. . . .
>
> * * *
>
> Under the protection of these vague phrases, which they alone must interpret, agency officials are given a wide area of discretion within which they can make capricious and arbitrary decisions about who gets information and who does not. *Id.* at 13649.

The most forceful statement in the debate on this issue was offered by Congressman Rumsfeld, another member of the Subcommittee and sponsor of an FOI bill: "This legislation is intended to mark the end of the use of such phrases as 'for good cause found,' 'properly and directly

concerned,' and 'in the public interest,' which are all phrases which have been used in the past by individual officials of the executive branch in order to justify, or at least to seem to justify the withholding of information that properly belongs in the hands of the public." *Id.* at 13654. *See also id.* at 13643 and 13656 (statements of Congressmen King and Rosenthal).

This overwhelming legislative record was conclusively confirmed by a vote of 308-0 in the House of Representatives. *Id.* at 13661. The Senate bill was passed by voice vote both in 1964, 110 Cong. Rec. 17668 (1964), and again in 1965, 111 Cong. Rec. 26821 (1965). Neither of these bills contained any remnant of the public interest standard.

ADDENDUM B

ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES
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Washington, D.C. 20037

OFFICE OF THE
CHAIRMAN

March 15, 1974

MEMORANDUM

TO: All Staff Attorneys

FROM: John F. Cushman /s/ JFC
Executive Director

SUBJECT: Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act – CORRECTION

At the bottom of page 31 of the subject report the following statement appears:

> "Explaining exemption (3) the House report, at page 10, notes that there are 'nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160.'
>
> "The reference to 'nearly 100 statutes' apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only

as authorized by law, or otherwise protect from disclosure."

This statement is incorrect in that the Administrative Conference of 1962 never conducted the survey referred to. The statement was inserted in the belief that Mr. David C. Eberhart, a member of the 1962 Conference and Director of the Federal Register, GSA, had made such a survey. While he did begin such a survey, it was never completed and therefore there is no list of "nearly 100 statutes."

I bring this to your attention because we receive requests for this non-existent information fairly regularly.